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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
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Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8
	)	

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REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The NBC Television Affiliates Association, the CBS Television Affiliates Association and the ABC Television Affiliates Association (together, the "Network Affiliated Station Alliance" or "NASA") hereby submit their reply comments in response to the Further Notice of Proposed Rule Making in the above-referenced dockets.[1/] NASA submits that the record in this proceeding contains no justification for any modification on the current national coverage cap of 25 percent as that cap is applied to the networks.

Opponents of existing national coverage limits expend most of their effort proving facts that have not changed materially since the ownership limits were adopted. In particular, the networks' focus on advertising markets fails to mention that advertising always has been a competitive marketplace with ample substitutes for national television advertising. Undue market influence, although an important consideration driving the national ownership rules, does not encompass the rules' entire purpose. In their haste to dispose of national ownership limits the networks have forgotten the Commission's longstanding policies in favor of localism which remain unaffected by an antitrust analysis. When viewed through the prism of localism or in light of the networks' power over their local affiliates, it is evident

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1/ Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221 and 87-8, rel. Jan. 17, 1995 (the "Notice").

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that the national coverage cap serves a significant public purpose. Indeed, many group owners — the potential beneficiaries of liberalized rules — support retaining the national coverage cap for these reasons. Thus, the national coverage cap should be retained for network organizations.

I. The Commission Should Reject the Networks' Antitrust Analysis.

The networks argue that under an antitrust analysis current levels of network ownership of local broadcast stations are too low to trigger competitive concerns. They base their conclusions on the level of competition in three economic markets identified in the *Notice:* the market for delivered video programming, the advertising market and the video program production market. Under generally accepted antitrust principles, the networks claim that all three markets are diverse and competitive and lack any need for ownership restrictions.[2/]

The networks' antitrust analysis, although theoretically interesting, fails to address the most vital concern underlying the national ownership rules. While it may be true that there is competition in the video programming marketplace, this competition has not alleviated the power of networks over the network-affiliate relationship. Allowing networks to increase the number of stations they can own will further increase their power over their affiliates, thereby crippling the ability of network affiliates to serve their local markets.

2/ Comments of CBS at 10 (all markets unconcentrated); Comments of NBC at 16 (ownership of up to 570 stations justified under antitrust analysis); Comments of Capital Cities/ABC at 11 (collusion unlikely among sellers of advertising time); Comments of Fox at 2 (programming diversity is assured).

The networks base their analysis on the underlying premise that the national ownership rules were created to inhibit the creation of monopolies.[3] However, the preservation of localism was an equally important consideration. As the Commission found in 1953 when it first increased the number of broadcast stations a single entity could own, it is important to preserve independent voices in the broadcast marketplace because owners with a local focus have a greater incentive to tailor their programming to the needs and interests of their communities.[4]

The networks argue that because they want to make as much money as possible, they also have a great incentive to tailor their programming to appeal to diverse audiences.[5] The unsurprising interest in increasing revenues is precisely the reason that networks lack the incentive to respond to individual community needs when the interests of those communities conflict with the interests of the national network.

It is beyond dispute that networks earn the majority of their money from selling advertising spots for their national programs.[6] Therefore, if the interest of a local community conflicts with airing one of the network's programs, the network would have a greater incentive to forego the local interest and run its programs. For example, recently in the Washington area, WUSA, owned by Gannett, Inc. ran the Children's Miracle Network

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3/ *See* Comments of CBS at 41-44; Comments of NBC at 7-9; Comments of Capital Cities/ABC at 17-19.

4/ The Amendment of Sections 3.35, 3.240 and 3.636 of the Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Station, *Report and Order*, 9 RR 1563, 1568 (1953).

5/ *See, e.g.,* Comments of CBS at 9; Comments of Capital Cities/ABC at 13-14.

6/ Increasingly, networks also will have opportunities to earn profits through the sale of programming in the syndication market. Their success in this market also is directly tied to the national success of the programming, not the needs of local communities.

telethon, a full-day charity fundraiser. WUSA is a CBS affiliate, and airing the telethon required it to preempt CBS's network programs that day. The Children's Miracle Network is a program that caters to and benefits the local community. Because WUSA is not owned by a network, it was not faced with the conflict between local needs and the effects of its preemption on national advertising sales. It is questionable whether a station owned by a network would have the same incentive to air such local-interest programming. For example, in the same Washington area market, WRC(TV), owned by NBC, does not typically air telethons and similar local-interest programming. One reason most likely is that NBC wants to gain as much revenue as possible from its national programming.[7/]

Similarly, ownership independence from the networks allows local affiliated stations to determine that a network program is not suited for their community. As described in NASA's comments, this is illustrated by the decision of a number of ABC-affiliated stations not to carry *NYPD Blue* because they concluded that viewers in their communities would prefer other programming.[8/] A network-owned broadcast station would have been unlikely to forego the advertising revenue that would result from such a decision.

It is important to the public interest that local network affiliates have the ability to modify their schedules and air locally-chosen programming that suits the needs of their local communities. Permitting networks to increase their ownership of television stations would

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7/ While the networks argue that their owned and operated stations do not run less public interest programming than independent affiliates, they do not cite any recent data. Rather, the only statistics used to support that claim come from a study completed more than 25 years ago, in 1969. [Economists, Inc. study at 80 n.115]. Data from 1969 says nothing about today's experience, in large part because the application processing guidelines then in effect **required** stations to air a certain percentage of public interest programming. Failing to meet this obligation would have jeopardized the licenses of the network-owned stations, so it is no surprise that they aired a significant amount of public interest programming in 1969.

8/ Comments of NASA at 4.

significantly affect the ability of local affiliates to remain at least marginally independent. In recent years, long-term affiliation agreements between networks and affiliates have restricted affiliates' ability to carry non-network programming during times when the network provides programming.[9/] Increasing ownership limits would greatly increase the dangers of network power in the network-affiliate relationship. While networks have incentives to treat affiliates fairly because of their need to carry network programming, these incentives cease to exist for the stations they own.

Moreover, if network ownership of individual stations is allowed to grow, even independent network affiliates will have less and less power to negotiate the offered terms. Because the relationship between networks and affiliates depends in part on the collective wisdom of all separately-owned affiliates, any meaningful increase in the number of network-owned stations is likely decisively to favor the networks. As the audience reach of network-owned stations increases, independent network affiliates will have less influence regarding network program policies because they will account for a smaller percentage of the networks' total audiences. The result will be affiliation agreements and network decision-making that effectively circumscribe the power of independent affiliates to make local programming decisions.

Indeed, the economic study provided to the Commission by the networks highlights this concern. One of the "benefits" of permitting the networks to own more television stations is to "reduc[e] the transactions [sic] costs of obtaining clearances."[10/] In other

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9/ *See* Comments of AFLAC Broadcast Group at 8-9.

10/ *See* Economists Incorporated, An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, May 17 1995 at 71.

words, the networks expect to use any increase in the national ownership cap to increase their leverage with all affiliates. Not coincidentally, an increase in the national coverage cap also will help to ensure that local community interests do not stand in the way of clearing national entertainment programming. The networks may wish to characterize the exercise of broadcasters' judgments about their communities as inefficient "transaction costs." In practice, however, those judgments are vital to maintaining the link between broadcasters and their communities of license.

The danger, therefore, is not that any one entity will obtain monopoly power of the video programming market. The danger is that increased network power will undermine the ability of local broadcasters to make programming decisions without the overbearing pressure of the network "big brother." Simply put, the networks' market power (or lack of market power) in the advertising marketplace is irrelevant to their ability to exert undue power over their affiliates. Indeed, if the networks lack market power as sellers of advertising they have stronger incentives to exert the power they have over affiliates because obtaining clearances and minimizing the costs of those clearances will be increasingly important to the networks' financial health.

Moreover, the markets on which the networks based their economic analysis have no relevance to the localism concerns of network affiliates. The networks examined the economic power in the delivered video programming market, the advertising market and the video program production market. The concentration of ownership in these markets does not have a great affect on the ability of networks to exert control over their affiliates. Since networks generally have only one affiliate in each market, any one network owning a local station will not have significant control over the local market.[11] However, if the national ownership limit is increased, the networks will significantly increase their power in network-affiliate relations.

Because it is vital to the public interest that local television stations retain the independence to disregard network interests when local interests must be considered, the Commission must not be misled by an irrelevant antitrust analysis into giving the networks substantially greater ownership of stations that eliminate the operation of independent-minded local affiliates that cater to the interests of local communities rather than the interests of the networks.

II. The Commission Should Recognize the Extent of Network Influence, Not Just Formal Control, in Its Evaluation of the National Ownership Cap.

Although the Commission's ownership rules are written in terms of "control," the effectiveness of the Commission's ownership rules actually depends on the ability of those rules to identify situations where an entity has the ability to influence the actions of a licensee.[12] It is for this reason that an entity can acquire "control" for the purposes of the ownership rules with interests much smaller than half of a licensee. *See* 47 C.F.R. 73.3555, Note 1. Accordingly, to paraphrase Commissioner Ness, the issue in this proceeding should be "the ability to *influence*, not control."[13] This is particularly true in network-affiliate

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11/ Changes in the Commission's duopoly rule, if adopted, also will affect the relative bargaining leverage between networks and their affiliates. *See Notice* at ¶¶ 105-116.

12/ NASA addresses these issues in more depth in its reply comments in the Commission's attribution rules proceeding, also filed today.

13/ BBC License Subsidiary L.P., *Memorandum Opinion and Order*, FCC 95-179, rel. Apr. 27, 1995, separate statement of Commissioner Ness at 1 ("BBC License Subsidiary").

relationships where the networks can achieve domination long before they obtain *de jure* control.

In its comments NASA showed how television networks have increased their influence in the operation of television stations through the use of less-than-controlling interests. These interests, which include non-voting stock interests and minority interests in stations controlled by a single majority shareholder, have increased dramatically in the last year. All four of the major networks have less-than-controlling interests in one or more stations and, after all currently-pending transactions are closed, three of the four will have total ownership interests that would exceed the current 25 percent coverage cap if they were counted.[14/]

Although these interests are not counted towards the ownership cap under the Commission's current rules, there can be no question that they confer significant influence on the networks. Indeed, the only reason that a network would choose to enter into one of these relationships as anything other than a passive investor is to increase its influence, assuring network affiliation and, equally important, clearances at the affected stations.[15/]

Given the level of influence conferred on the networks by their less than controlling interests in affiliated stations, the effect of any increase in the national ownership cap for networks will be greatly magnified. Thus, any analysis that fails to account for the networks' exploitation of loopholes in the ownership rules will significantly understate the effects of any change in national ownership cap. Moreover, the increased influence acquired by the networks through their less-than-controlling interests is, in and of itself, an important reason not to increase the national ownership cap for the networks. Because the networks'

14/ Comments of NASA at 10-11 and Exhibit 1.

15/ *See* Comments of NASA at 11; Comments of AFLAC Broadcast Group at 15-19.

influence already stretches far beyond what is contemplated by the rules, any increase would tilt the balance of network-affiliate relationships much more heavily in favor of the networks. This would greatly hamper the ability of individual affiliates to make independent programming decisions and reduce their ability to be responsive to local needs.

III. Potential Beneficiaries of Liberalization Favor Retaining the National Coverage Limit.

The networks strongly favor elimination of all restraints on ownership, but other potential beneficiaries, independent group owners, have a different view. Indeed, many group owners support retaining national ownership interests, even though those limits would appear to be contrary to their pecuniary interests.[16/]

These group owners recognize the importance of localism and the negative effect increased network ownership would have on the independence of local affiliated stations. As AFLAC Broadcasting Group explained in its comments, while antitrust law is fundamentally an economic and mathematical analysis, localism and diversity are imprecise qualities that cannot be reduced to numbers.[17/] Indeed, the questions at issue in this proceeding have little to do with an antitrust analysis of various market powers. The integrity and unique character of the American broadcast system is at stake. The foundation of the broadcast industry has been built on service to local communities. Allowing the networks to have further control over their affiliates will undermine this fundamental objective, even if no antitrust principles are violated.

16/ *See, e.g.* Comments of AFLAC Broadcast Group at 2-3; Comments of Pulitzer Broadcasting Group at 3-4; Comments of Lee Enterprises at 2-5; Comments of Post-Newsweek Stations, Inc. at 2-5.

17/ *See also* Comments of Pulitzer Broadcasting Group at 3-4.

IV. Conclusion

The record in this proceeding shows that the basic principles underlying the limitations on network ownership of television stations have continued vitality in today's marketplace. The Commission's longstanding policy favoring localism supports retaining the limitation. Moreover, limits on network ownership of television stations are necessary to rein in their increasing power over their affiliates. Consequently, no modification in the national coverage cap is justified.

For these reasons, the Network Affiliated Stations Alliance urges the Commission to adopt rules that are consistent with these reply comments.

Respectfully submitted,

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July 10, 1995

CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 10th day of July, 1995, I caused a copy of the foregoing "REPLY COMMENTS OF THE NETWORK AFFILIATE STATIONS ALLIANCE" to be sent via hand delivery to the following:

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